82-1076

No.

Office-Supreme Court, U.S.
FILED
DEC 23 1982
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
JAMES B. EDWARDS, Secretary of Energy,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

ALLAN ABBOT TUTTLE
Counsel of Record
JAMES R. PATTON, JR.
GEORGE M. BORABABY
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Attorneys for Petitioner State of Louisiana

ANDREW J. KIRKPATRICK, JR.
WILLIAM O. LAMOTTE, III
RICHARD D. ALLEN
MORRIS, NICHOLS, ARSHT & TUNNELL
Twelfth & Market Streets
P.O. Box 1347
Wilmington, Delaware
(302) 658-9200
Attorneys for Petitioner Texaco Inc.

JOHN R. COPE
THOMAS D. MANFORD, III
DARCI L. ROCK
BRACEWELL & PATTERSON
1825 I Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorneys for Petitioner The Louisiana Land And Exploration Company

Other counsel for petitioners are listed on inside cover.

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

THE HONORABLE DAVID C. TREEN
Governor, State of Louisiana

THE HONORABLE WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

THE HONORABLE FRANK P. SIMONEAUX
Secretary, Department of Natural Resources,
State of Louisiana

THE HONORABLE PATRICK H. MARTIN
Commissioner of Conservation,
State of Louisiana

HARRY E. BARSH, JR.
DAVID R. FROHN
CAMP, CARMOUCHE, PALMER, BARSH & HUNTER
A Professional Law Corporation
P.O. Drawer 2001
Lake Charles, Louisiana 70602
(318) 433-9355
Of Counsel for Petitioner State of Louisiana

STEPHEN H. BARD
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
(914) 253-4000

PATRICK T. CAFFERY
CAFFERY, OUBRE, GIBBENS & BLACKWELL
420 Iberia Street
New Iberia, Louisiana 70560
(318) 364-1816
Of Counsel for Petitioner Texaco Inc.

J. HENRY PHILLIPS, III
CHARLES D. MARSHALL, JR.
MILLING, BENSON, WOODWARD, HILLYER,
PIERSON & MILLER
Eleventh Floor
Whitney Building
New Orleans, Louisiana 70130
(504) 581-3333
Of Counsel for Petitioner The Louisiana Land And Exploration Company

December 23, 1982

QUESTIONS PRESENTED

The "property" concept was the basic building block of the federal program under which the prices of crude oil produced in the United States were controlled. In regulations issued when that price control program was created in 1973, the term "property" was defined as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum."

The questions are:

1. Where the Temporary Emergency Court of Appeals, which has exclusive appellate jurisdiction over cases arising under that federal price control program, has twice ruled that the focus of the "property" definition is not on the "lease or fee interest" but on the "right to produce" crude oil, and that the sovereign acts of State regulatory authorities, such as the establishment by Louisiana's Office of Conservation of production units, delimit that "right to produce," did that court err in later upholding an agency interpretation of "property" that ignored the significance of such sovereign acts and, instead, interpreted "property" as synonymous with the "lease or fee interest."

2. May the Temporary Emergency Court of Appeals defer, without analysis, to the agency's "general position" that the lease or fee interest, not the sovereign act of a State regulatory authority, defines the "property," when that position is not supported by the language of the "property" definition, was first adopted three years after the promulgation of that definition, is inconsistent with earlier agency interpretations of that definition and cannot be reconciled with that court's own prior construction of that definition.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Temporary Emergency Court of Appeals are listed in the caption of the case in this Court.*

---

* The names of all parent companies, non-wholly-owned subsidiaries and affiliates of Texaco Inc. are set forth in Appendix H hereto.

The following are the names of all parent companies, non-wholly-owned subsidiaries and affiliates of The Louisiana Land And Exploration Company: CLAM Petroleum Company (affiliate); and The Louisiana Land Offshore & Exploration Company (non-wholly-owned subsidiary).

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTES, REGULATIONS AND RULINGS INVOLVED	2
STATEMENT OF THE CASE	3
Regulatory Background	4
Crude Oil Production And Regulation In Louisiana	8
Proceedings Below	10
REASONS FOR ALLOWING THE WRIT	14
1. The meaning of "property" is an important question of federal law	16
2. The Temporary Emergency Court of Appeals has confused rather than clarified the meaning of "property"	18
3. The Temporary Emergency Court of Appeals' uncritical acceptance of the DOE's general "lease defines the property" interpretation has denied petitioners their right to meaningful judicial review	23
CONCLUSION	27

TABLE OF AUTHORITIES

CASES: Page

American Ship Building Co. v. *NLRB*, 380 U.S. 300 (1965) 24
Batterton v. *Francis*, 432 U.S. 416 (1977) 24
Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 23, 24
Energy Reserves Group, Inc. v. *Dep't of Energy*, 589 F.2d 1082 (Temp. Emer. Ct. App. 1978) 26
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 23
Grigsby v. *Dep't of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979) 13, 14, 18, 19, 20, 21, 22, 24
Pennzoil v. *Dep't of Energy*, 680 F.2d 156 (Temp. Emer. Ct. App. 1982) 15, 20, 22, 24
Ptasynski v. *United States*, 550 F. Supp. 549 (D.Wyo. 1982) 16
Skidmore v. *Swift & Co.*, 323 U.S. 134 (1944) 13, 15, 23, 25
Texaco Inc. v. *Dep't of Energy*, 490 F. Supp. 874 (D.Del. 1980) 11
Volkswagenwerk v. *Federal Maritime Comm'n*, 390 U.S. 261 (1968) 24

STATUTES:

Administrative Procedure Act of 1946, *as amended*,
5 U.S.C. § 702 11
5 U.S.C. § 706 ..... 11, 25
Crude Oil Windfall Profit Tax Act of 1980, P.L. 96-223, 94 Stat. 229 (1980) 16, 17
Department of Energy Organization Act, P.L. 95-91, 91 Stat. 589 (1977), 42 U.S.C. § 7192(b) 11
Economic Stabilization Act of 1970, *as amended*, 12 U.S.C. § 1904 note 2, 4, 18
Section 210(a) 11
Section 211(a) 11
Section 211(b) 18
Section 211(g) 2

TABLE OF AUTHORITIES—Continued

	Page
Emergency Petroleum Allocation Act, P. L. 93-159, 87 Stat. 627 (1973)	
15 U.S.C. § 753(a)	2
15 U.S.C. § 754(a)(1)	11
Energy Policy and Conservation Act, P.L. 94-163, 89 Stat. 871 (1975), 42 U.S.C. § 6393(b)	11
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1331	11
La. Rev. Stat. Ann.	
30:2	9
30:3(1)	9
30:9B	9
LEGISLATIVE MATERIALS:	
Actions Taken By The Federal Energy Administration To Implement The Pricing Requirements Of The Energy Policy And Conservation Act: Hearing Before The Subcommittee On Energy And Power Of The House Comm. On Interstate And Foreign Commerce, 94th Cong., 2d Sess. (1976)	6
S. 1080, 97th Cong., 2d Sess. 128 Cong. Rec. S2713 (daily ed., March 24, 1982)	25
H.R. 746, 97th Cong., 1st Sess., 127 Cong. Rec. H73 (daily ed., January 6, 1981)	25
S. Rep. No. 507, 92nd Cong., 1st Sess. (1971)	18
S. Rep. No. 394, 96th Cong., 1st Sess. (1979)	17
S. Rep. No. 284, 97th Cong., 1st Sess. (1981)	26
H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982)	25
EXECUTIVE ORDERS:	
Executive Order No. 11723, 38 Fed. Reg. 15763 (June 15, 1973)	4
Executive Order No. 12287, 46 Fed. Reg. 9909 (January 30, 1981)	16

TABLE OF AUTHORITIES—Continued

CODE OF FEDERAL REGULATIONS: Page

6 C.F.R. § 150.353 *et seq.*, 38 Fed. Reg. 22536 (August 22, 1973) 2
10 C.F.R. Part 205, Subpart O (1982) 11
10 C.F.R. § 212.72 (1974) 2
26 C.F.R. § 150.4996-1(i)(1), 47 Fed. Reg. 50858 (November 10, 1982) 17

FEDERAL REGISTER:

38 Fed. Reg. 15763 (June 15, 1973) 4
38 Fed. Reg. 19464 (July 20, 1973) 4
38 Fed. Reg. 22536 (August 22, 1973) 2, 5
39 Fed. Reg. 1924 (January 15, 1974) 2
40 Fed. Reg. 40832 (September 4, 1975) 5, 6, 19
41 Fed. Reg. 16179 (April 16, 1976) 6, 7
41 Fed. Reg. 36172 (August 26, 1976) 2, 5, 7, 8
42 Fed. Reg. 3628 (January 19, 1977) 2
46 Fed. Reg. 9909 (January 30, 1981) 16
47 Fed. Reg. 50858 (November 10, 1982) 17

ADMINISTRATIVE RULINGS:

Ruling 1975-15, 40 Fed. Reg. 40832 (September 4, 1975) 5, 6, 19
Ruling 1977-1, 42 Fed. Reg. 3628 (January 19, 1977) 2

OTHER AUTHORITIES:

Davis, Administrative Law Of The Seventies (1976) 26
U.S. General Accounting Office, Uncertainties About The Definition And Scope Of The Property Concept May Reduce Windfall Profit Tax Revenues, GAO/GGD 82-48, May 13, 1982 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No.

STATE OF LOUISIANA, TEXACO INC. and
THE LOUISIANA LAND AND EXPLORATION COMPANY,
Petitioners,

v.

DEPARTMENT OF ENERGY and
JAMES B. EDWARDS, Secretary of Energy,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

The petitioners the State of Louisiana ("Louisiana"), Texaco Inc. ("Texaco") and The Louisiana Land And Exploration Company ("LL&E") respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Temporary Emergency Court of Appeals entered in this proceeding on October 4, 1982.

OPINIONS BELOW

The opinion of the Temporary Emergency Court of Appeals is reported at 690 F.2d 180 (App. A). The opinion of the district court denying respondents' motions to dismiss is reported at 507 F.Supp. 1365 (App. D).

The opinion of the district court granting summary judgment to petitioners is reported at 519 F.Supp. 351 (App. E).

JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on October 4, 1982 (App. B). The Order of that court denying rehearing with suggestion of rehearing *en banc* was entered on November 26, 1982 (App. C). This Court has jurisdiction under Section 211(g) of the Economic Stabilization Act of 1970, as amended, 12 U.S.C. § 1904 note, and 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS AND RULINGS INVOLVED

This case arises out of petroleum pricing regulations promulgated by the Cost of Living Council ("CLC") under the authority of the Economic Stabilization Act of 1970 ("ESA"), as amended, 12 U.S.C. § 1904 note, as part of Phase IV of the Economic Stabilization Program, and originally codified at 6 C.F.R. § 150.353 *et seq.* *See* 38 Fed. Reg. 22536 (August 22, 1973). Pursuant to Section 4(a) of the Emergency Petroleum Allocation Act of 1973 ("EPAA"), as amended, 15 U.S.C. § 753(a), the then Federal Energy Office ("FEO") republished and recodified the CLC petroleum regulations, without substantive change, as the Mandatory Petroleum Allocation and Price Regulations, 10 C.F.R. Parts 211 and 212. 39 Fed. Reg. 1924 (January 15, 1974). The regulatory definition involved in this case was then codified at 10 C.F.R. § 212.72 (App. F). The challenged agency interpretation of that definition was first set out in the preamble to a rulemaking dated August 20, 1976. 41 Fed. Reg. 36172 (August 26, 1976) (App. G). That interpretation was later republished in the form of an agency Ruling, Ruling 1977-1. 42 Fed. Reg. 3628 (January 19, 1977).

STATEMENT OF THE CASE

1. This case presents the issue of the meaning of the term "property," a term of "fundamental importance" to the regulatory program under which the price of crude oil produced in the United States was controlled. *See* App. A at 4a. When it established the price control program in August 1973, the Cost of Living Council defined "property" as "the right which arises from a lease or from a fee interest to produce domestic crude petroleum." *Id.* at 5a. With no guidance from the CLC, and under threat of civil and criminal sanctions, crude oil producers had immediately to apply that definition to thousands of producing entities and to price their crude oil accordingly.

In Louisiana, a large percentage of crude oil is found under vast State leases that may cover hundreds of square miles. *See* App. E at 48a. Since 1940, Louisiana's Office of Conservation ("LOC") has regulated crude oil production in the State by, *inter alia*, establishing reservoir-wide production units within these State leases and controlling the amount of crude oil produced from these units. *Id.* at 47a-48a. Reflecting the pervasive effect that the LOC's control over production within Louisiana has on the "right to produce" crude oil, crude oil producers in Louisiana, including petitioner Texaco, designated such Louisiana production units as "properties" for federal pricing purposes.

In August 1976, the Department of Energy ("DOE"),[1] for the first time, and in the face of earlier contrary interpretations, interpreted "property" to preclude the designation of separate Louisiana production units as "rights to produce" and, hence, "properties." App. D at 35a-36a. On the basis of that interpretation, the DOE then commenced administrative proceedings against peti-

[1] As used herein, the term "DOE" includes the DOE and its predecessor agencies, the FEO and the Federal Energy Administration ("FEA"), and, where applicable, respondent Secretary of Energy.

tioner Texaco and others, alleging over one billion dollars in crude oil pricing overcharges. In its decision in this case, the Temporary Emergency Court of Appeals upheld the DOE's belated interpretation, despite the fact that, in an earlier decision, that same court had ruled that orders creating Louisiana production units delimit the "right to produce" and thus create "properties."

The court went on to grant summary judgment for the DOE despite the fact that the Department had neither sought such relief nor made a record to support it and, indeed, had argued that summary judgment was inappropriate.

Regulatory Background

2. In June 1973, as part of the Economic Stabilization Program instituted under the Economic Stabilization Act of 1970, as amended, the President imposed a freeze on the prices of all non-agricultural commodities and services, including domestically-produced crude oil. *See* Executive Order No. 11723, 38 Fed. Reg. 15763 (June 15, 1973). Shortly thereafter, in July 1973, the Cost of Living Council, "recogniz[ing] a need to stimulate increased [domestic crude oil] production," proposed to modify the crude oil price freeze by creating, as an "incentive plan," a "two-tier pricing system for crude oil." 38 Fed. Reg. 19464, 19467 (July 20, 1973). Basically, under that system, the amount of oil produced monthly from a "property" up to the amount produced from that "property" in the corresponding month of 1972 was classified as "old oil," to be sold at controlled prices. Increased production from that "property," and production from newly-developed "properties," were classified as "new oil," to be sold at higher market-set prices. *See* App. A at 4a. This "two-tier" system had a dual objective: to control inflation by holding down the price of currently-produced oil, and to stimulate new production by allowing "new oil" to be sold at uncontrolled market prices. *Id.* at 14a.

As the court below recognized,

> Because the two-tier system was thus based on a property-by-property comparison of current production with 1972 production, the definition of the term "property" was of fundamental importance.

Id. at 4a. Notwithstanding the importance of the concept, the CLC's July 1973 Notice of the proposed pricing regulations did not include a definition of the term "property."

In the final regulation, effective August 19, 1973, the CLC did define the term "property":

> "Property" is the right which arises from a lease or from a fee interest to produce domestic crude petroleum.

38 Fed. Reg. 22536, 22538 (August 22, 1973). *See* App. F. That definition, in the words of the court below, was "rudimentary." App. A at 4a. Furthermore, the preamble to the regulation was silent as to the definition's meaning and application. And, as the agency itself later acknowledged, neither the CLC nor its successors, the Federal Energy Office and the Federal Energy Administration, gave producers any guidance as to its meaning for more than two years. 41 Fed. Reg. 36172, 36175 (August 26, 1976), App. G at 69a-70a. Nonetheless, producers had to apply that "rudimentary" definition immediately to thousands of producing entities to identify their "properties" for price control purposes.

3. The DOE did not issue the first public interpretation of the "property" definition until September 1975, fully two years after the initial promulgation of the regulation. App. A at 5a. In that interpretation, Ruling 1975-15, the DOE acknowledged the "right to produce" as the core concept of the "property" definition:

> For purposes of the price regulations then, the property concept is one that identifies the *right to produce*

> *crude oil*, whether that right arises from a lease or from a fee interest.

40 Fed. Reg. 40832 (September 4, 1975) (emphasis original). Ruling 1975-15 further recognized that producing entities other than leaseholds or fee interests, such as "units," could embody the "right to produce" and thus define "properties" for purposes of federal price controls. The agency also informed producers that, although the mere existence of separate reservoirs within the boundaries of a single lease would not, in itself, give rise to separate "properties," "where there are separate and distinct rights to produce crude oil from each reservoir, each reservoir accordingly represents a different property." *Id.* at 40833.

4. However, the DOE remained unclear as to the meaning and scope of the "right to produce" concept. In testimony before a congressional committee, the FEA's Deputy Administrator admitted: "It was not clear throughout that period [August 1973 to August 1976] exactly what the [1973 "property"] regulation meant; it was not even clear to the regulatory agency itself." [2]

5. In April 1976, almost three years after the CLC promulgated the "property" definition, the DOE published its "tentative interpretation" as to what "property" meant "since the initiation of the price regulations." 41 Fed. Reg. 16179, 16180 (April 16, 1976). The DOE emphasized Ruling 1975-15's recognition that "FEA regulations utilize, as a reference, a property concept, based upon the right to produce crude oil, ..." *Id.* at 16179. The DOE "tentatively concluded" that state-recognized production units could constitute separate "properties" under the 1973 definition. *Id.* at 16180. Indeed, the DOE

---

[2] Actions Taken By The Federal Energy Administration To Implement The Pricing Requirements Of The Energy Policy And Conservation Act: Hearing Before The Subcomm. On Energy And Power Of The House Comm. On Interstate And Foreign Commerce, 94th Cong., 2d Sess. 103 (1976) (Statement of Hon. John A. Hill).

specifically recognized that Louisiana production units do constitute such "rights to produce":

> For example, in Louisiana, where unitization may be compelled by the Commissioner of Conservation, the recognition by the state of producing entities is generally based upon factors other than merely surface boundaries. Such productive entities are called "units," . . . . [*I*]*n Louisiana each state-recognized unit may therefore appropriately describe a property*, with each lease upon which is reported non-unitized production also appropriately describing a separate property.

Id. (emphasis added). Thus, as late as April 1976, the DOE interpreted the original "property" definition to mean that Louisiana reservoir-wide units are "properties."

6. However, in August 1976, the DOE abruptly reversed itself and issued the "formal interpretation" of the 1973 "property" definition that petitioners challenge in this action. 41 Fed. Reg. 36172, 36178 (August 26, 1976), App. G at 52a, 83a. In that interpretation, the DOE all but disregarded its prior pronouncements that the "right to produce" crude oil could derive from instruments other than leases or deeds. Instead, it took the position that the term "right to produce" is "generally synonomous [sic] with the concept of 'working interest,' . . .," App. G at 74a, and that the "working interest" is " '[t]he operating interest under an oil and gas lease.' " *Id.* at 67a. From this, the DOE concluded:

> [T]he literal meaning of the term "property," as defined by FEA, is generally to be understood as synonymous with the physical "tract" or "premises" as to which a working interest is established by an oil and gas lease, or by a fee interest.
>
> * * * *
>
> Although the evidence is not unambiguous, FEA has concluded that CLC by its definition of the term

> "property" intended to refer to the premises described in the oil and gas lease pursuant to which crude oil was being produced.

Id. at 66a. By imputing this intention to the CLC, the DOE held that "property" had, since August 1973, meant the premises defined by a lease or fee interest, but not by other "rights to produce."

The DOE's 1976 interpretation, if correct, meant that producers of crude oil in Louisiana should not have regarded State orders creating reservoir-wide production units as "rights to produce" and should not on that basis have treated such units as "properties." However, at the same time that it construed the "property" definition as having precluded such treatment since August 1973, the DOE ruled that each state-recognized reservoir could, as of September 1, 1976, be treated as a "property." *Id.* at 86a.[3]

Crude Oil Production And Regulation In Louisiana

7. For many years, Louisiana has been the second largest crude oil producing state in the continental United States. A major portion of Louisiana crude oil production is derived from premises leased from the State. In many instances, the areas encompassed by such leases are vast. *See* App. E at 48a. For example, as of August 1973, when the CLC imposed the price control system, over 60 percent of Texaco's annual production of more

---

[3] The DOE redefined "property" to add a second sentence to the original definition. Effective September 1, 1976, "property" was defined as follows:

> "Property" means the right to produce domestic crude oil, which arises from a lease or from a fee interest. A producer may treat as a separate property each separate and distinct producing reservoir subject to the same right to produce crude oil, provided that such reservoir is recognized by the appropriate governmental regulatory authority as a producing formation that is separate and distinct from, and not in communication with, any other producing formation.

App. G at 110a.

than 100 million barrels of Louisiana crude oil came from just six such large State leases. Two such leases, State Leases 335 and 340, both leased in 1936, each originally covered more than 1,200 square miles—each just slightly less than the area encompassed by the State of Rhode Island. State Lease 340, after selections and releases of portions thereof by Texaco, now covers more than 271 square miles, with oil from that Lease being produced from eight separate tracts, some of which are located more than 40 miles apart. State Lease 335 now covers more than 21 square miles and consists of three separate tracts, one of which is located more than 28 miles from the other two. Texaco's four other large State Leases referred to above have similar broadly-scattered producing configurations.

8. Since 1940, long before the institution of federal crude oil price controls, Louisiana has regulated oil and gas production within the State on the basis of oil and gas production units. These units are established in order to insure the orderly development of petroleum resources, to prevent the waste of such resources and to avoid the drilling of unnecessary wells. La. Rev. Stat. Ann. 30:2, 30:3(1), 30:9B. *See* App. A at 7a. Such units, whether "reservoir-wide" (*i.e.*, one unit encompasses an entire producing reservoir) or less than reservoir-wide (*i.e.*, more than one unit is established to extract crude oil from a single reservoir), are established on the basis of the geological limits of the producing reservoir, not on the basis of lease lines or fee interest boundaries. App. E at 47a.

The Louisiana Office of Conservation has promulgated detailed restrictions on the production of oil and gas and has imposed extensive requirements for reporting drilling and production activities. The LOC sets an allowable rate of production for each unit and limits production from that unit to that allowable rate. Production is generally reported to Louisiana authorities for royalty and severance tax purposes on a unit basis. Through

this comprehensive regulatory system, the State pervasively controls and regulates the amount and rate of crude oil production within its borders.

9. When the two-tier pricing system was established in August 1973, crude oil producers had two weeks in which to make their "property" designations. The only guidance that producers had in making their designations were the "rudimentary" language of the definition itself; the knowledge that the two-tier system was designed to provide an incentive to increase production; and the expectation that the price control system was to expire in eight months or less and thus was to be implemented with minimal disruption to normal business functions. None of these factors suggested that producers could treat only leaseholds or fee interests as "properties." Indeed, in Louisiana, the incentive objective dictated that producers not treat the lease as the "property" since, if the entire lease were treated as a single "property," the natural decline in output from currently producing reservoirs underlying a large multi-reservoir lease would deny the intended incentive of "new oil" prices to oil produced from newly-developed reservoirs on that lease. *See* App. E at 48a. Moreover, in Louisiana, Texaco and other producers had in place reporting and accounting procedures that were based on the long-standing LOC system of regulating and monitoring oil and gas production on the basis of production units. *Id.* at 47a. Consequently, these producers designated as separate "properties" separate reservoir-wide LOC production units located within the geographic boundaries of a single lease. App. A at 7a.

Proceedings Below

10. In May 1979, the DOE issued Proposed Remedial Orders ("PRO") against petitioner Texaco and other producers of crude oil in Louisiana. The PRO against Texaco alleged that Texaco had overcharged purchasers of crude oil by $748 million and sought, including interest, $888 million in refunds. App. A at 3a; App. D at 30a. Texaco filed a Notice of Objection to the PRO,

whereupon an administrative proceeding was instituted before the DOE's Office of Hearings and Appeals, pursuant to 10 C.F.R. Part 205, Subpart O. App. D at 30a-31a.

11. In May 1980, Louisiana brought the instant action, challenging the DOE's 1976 interpretation of the 1973 "property" definition, in the United States District Court for the Western District of Louisiana.[4] Texaco and LL&E intervened as of right.[5] The district court granted petitioners' motion for summary judgment, declaring that petitioners could properly have treated reservoir-wide LOC units as "properties" and enjoining the DOE from enforcing against petitioners any contrary "property" interpretation. App. E at 49a.[6]

The court observed that the original "property" definition promulgated by the CLC was ambiguous, unclear and "offered no clue whatsoever" that separate reservoir-

---

[4] The district court had jurisdiction over this action under Sections 210(a) and 211(a) of the ESA, as carried forward by Section 5(a)(1) of the EPAA, as amended, 15 U.S.C. § 754(a)(1); Section 532(b) of the Energy Policy and Conservation Act, as amended, 42 U.S.C. § 6393(b); and Section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b). Jurisdiction was also based on 28 U.S.C. § 1331 and on the Administrative Procedure Act, 5 U.S.C. §§ 702 and 706.

[5] Texaco had initially filed suit against the DOE in the United States District Court for the District of Delaware. Louisiana and LL&E intervened in that action. On the DOE's motion, that court dismissed the complaints of Texaco and LL&E on the ground that they were not ripe for adjudication. The court declined to dismiss Louisiana's complaint, withholding decision until the DOE filed its answer and indicated whether it would challenge venue in Delaware. *Texaco Inc.* v. *Dep't of Energy*, 490 F. Supp. 874 (D.Del. 1980). Louisiana voluntarily dismissed its complaint in that court and brought this action in Louisiana.

[6] Earlier, the district court had denied respondents' motions to dismiss petitioners' complaints for lack of standing and ripeness and for failure to exhaust administrative remedies. App D.

wide LOC units could not be treated as separate "properties." *Id.* at 49a, 50a. It noted that the "right to produce may arise from more than one basis or designation." *Id.* at 47a. The court then discussed the characteristics of reservoir-wide LOC units and concluded that "the designation of such units as properties is consistent with the objectives of the two-tier pricing system established in 1973." *Id.* at 48a. On this basis, the court decided that it was reasonable for producers in Louisiana to have treated such units as "properties" prior to the DOE's belated adoption of its "property" interpretation in August 1976. *Id.* at 49a.

The court further found that the DOE itself had been unclear as to the meaning of the "property" definition before August 1976. *Id.* It observed that the DOE had tentatively concluded in April 1976 that reservoir-wide LOC production units could properly be designated as "properties." *Id.* The court decided that the totality of these circumstances dictated that it should not defer to the DOE's belated interpretation of "property" or allow the DOE to enforce that interpretation against petitioners for the period prior to the August 1976 amendment to the "property" definition. *Id.* at 48a-49a.

12. On appeal, the Temporary Emergency Court of Appeals ("TECA") reversed the district court's grant of summary judgment to petitioners and directed that summary judgment be entered for the DOE. App. B. In its opinion, the court first recalled its earlier holdings that " '[t]he focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.' " App. A at 14a. It then acknowledged that the DOE could "rationally" have relied on "concepts of state regulation in clarifying the meaning of the 'right to produce.' " *Id.* at 15a. Nevertheless, it upheld the DOE's August 1976 interpretation that "the lease defines the property" on the sole ground that that interpretation was also "reasonable." *Id.* at 14a, 18a. In doing so, it effectively ignored the "right to produce" lan-

guage in the "property" definition, concentrating instead on the "fee or leasehold" aspect of that definition.

TECA then attempted to distinguish this case from its earlier decision in *Grigsby* v. *Dep't of Energy*, 585 F.2d 1069, *modified on rehearing*, 585 F.2d 1080 (Temp. Emer. Ct. App. 1978), *cert. denied*, 440 U.S. 908 (1979). In *Grigsby*, TECA had analyzed the "right to produce" concept and had concluded that an order of the Louisiana Office of Conservation establishing a single "unit" out of parts of several leases created a new "right to produce" and, therefore, a new "property." 585 F.2d at 1083, 1085. Here, TECA sought to distinguish *Grigsby* on the ground that production from several reservoir-wide LOC units lying within a single lease could not be "gerrymandered" where the lease defines the "property," whereas production from a single unit composed of parts of several leases, as in *Grigsby*, could be "gerrymandered" if each lease were considered a "property." TECA concluded that in *Grigsby*, therefore, the DOE was justified in "depart-[ing] from its general position that the lease defines the property" whereas the DOE had "no reason" to do so here. App. A at 17a, 18a. TECA did not explain how the fundamental "right to produce" concept supports such a distinction.

TECA then rejected, without independent analysis, the district court's determination that the DOE's belated, inconsistent "property" interpretation did not merit judicial deference. *Id.* at 18a. In so ruling, TECA ignored the criteria for deference established by this Court in *Skidmore* v. *Swift & Co.*, 323 U.S. 134 (1944). Thus, TECA deferred to the DOE's interpretation without disputing the district court's findings that petitioners' interpretation was consistent with the regulatory objectives of the price control system and that the DOE's August 1976 interpretation was inconsistent with its earlier pronouncements and was not apparent to the industry—or even to the agency—during the period it purports to control. *See*

App. E at 48a-49a. Instead, TECA noted that the DOE had consistently maintained that separate reservoirs in and of themselves are not separate "properties," but failed to apprehend that that position of the DOE is not at issue in this case. *See* App. A at 15a. In addition, TECA stated—incorrectly and without record support—that petitioners had never sought agency guidance as to the "property" definition. *Id.* at 20a.

Moreover, TECA not only vacated the district court's order granting summary judgment to petitioners, but directed the district court to enter summary judgment for the DOE, App. B, even though the DOE had not requested summary judgment or made a record to support such relief and, in fact, had insisted that material issues of fact were in dispute and required resolution. This *sua sponte* grant of summary judgment for the DOE denied petitioners a full hearing on issues that bear on the agency's claim against Texaco for nearly one billion dollars, perhaps the largest claim ever made by a federal agency against a single regulated party.

REASONS FOR ALLOWING THE WRIT

"Property," the most fundamental concept of the federal program governing the pricing of domestic crude oil, has been left in unconscionable confusion by the decision below. In three decisions—by three different panels composed of nine different judges—the Temporary Emergency Court of Appeals has produced diametrically opposed and irreconcilable interpretations of "property." In the first, the court ruled that a Louisiana Office of Conservation production unit constituted a "property" because the focus of the definition was on "the right to produce," not the lease, and "such a 'right to produce' is controlled, limited, or extended by contractual agreement and state authorities." *Grigsby*, 585 F.2d at 1083. In the second, the court confirmed that focus on the "right to produce" as a matter of principle, holding that "property" meant something "obviously quite different" from

a "lease or fee interest." *Pennzoil Co.* v. *Dep't of Energy*, 680 F.2d 156, 168 (Temp. Emer. Ct. App. 1982). However, in the third—the decision below—the court inexplicably deferred to a belated agency interpretation that the focus of the definition was the "lease or fee interest" and thus that Louisiana production units did not define "properties." In so doing, the court ignored its own precedents, thereby creating a conflicting and inconsistent rule within the judicial body having exclusive jurisdiction to review the administration of this important regulatory program.

The court abdicated its responsibility of judicial review in reaching this extraordinary conclusion. The court deferred to the agency's belated view on the sole ground that it was "reasonable." It failed to consider those factors which this Court held in *Skidmore* determine whether deference should be accorded to an agency interpretation. It never focused on the timing of the agency interpretation, even though that interpretation was issued fully three years after the definition itself and at the end of the period involved in this case. It never focused on the consistency or inconsistency of the agency interpretation with earlier agency pronouncements, even though the agency position was an abrupt departure from the agency's earlier pronouncements. And it never focused upon the thoroughness of the agency's consideration or the validity of its reasoning, even though that court itself had twice interpreted the definition in a directly contrary way and even though senior agency officials had admitted to Congress that the meaning of the definition had never been clear to the agency itself.

The result is not only gross injustice to petitioners, who are penalized for failing to predict in 1973 the agency's change of position in 1976 and from whom the DOE consequently seeks almost one billion dollars, but also confusion and uncertainty generally in other judicial and administrative cases involving billions of dollars in alleged overcharges in the sale of crude oil. Similar con-

fusion and uncertainty is now a serious threat in the administration of the Crude Oil Windfall Profit Tax Act as well.

1. *The meaning of "property" is an important question of federal law.* Under the crude oil pricing regulations, "the definition of the term 'property' was of fundamental importance." App. A at 4a. In fact, "the property concept" was "the basic building block of the two-tier system for pricing old and new oil." *Id.* at 14a. Although the petroleum price controls have been terminated,[7] numerous lawsuits and administrative proceedings involving the interpretation and application of the regulations implementing those controls persist. At stake in these lawsuits and proceedings are claims of crude oil pricing overcharges totalling in the billions of dollars.[8] It can be expected that those administrative proceedings that result in determinations adverse to producers will eventually be challenged in the federal courts. Since the meaning and application of "property" is at issue in most of these cases and proceedings, the question at issue here as to the correct interpretation of that term is likely to consume a considerable amount of administrative and judicial energy and resources for years to come.

Moreover, "property" is an equally critical concept under the Crude Oil Windfall Profit Tax Act, P.L. 96-223.[9]

---

[7] Executive Order 12287, 46 Fed. Reg. 9909 (January 30, 1981).

[8] For example, on the same day that the DOE issued its Proposed Remedial Order against Texaco, it issued PROs against six other major crude oil producers. In total, the DOE charged these seven producers alone with having overcharged their customers by $1.7 billion. Most of these overcharge claims continue to be litigated before the DOE's Office of Hearings and Appeals.

[9] In *Ptasynski* v. *United States*, 550 F.Supp. 549 (D. Wyo. 1982), the United States District Court for the District of Wyoming held the Windfall Profit Tax Act to be violative of the uniformity clause of the United States Constitution, art. 1, § 8, cl. 1. However, the court ordered that the tax continue to be collected until a higher court has passed upon the correctness of its decision.

Under that Act, crude oil production is classified into "tiers" that determine both the rate of tax and the increment of profit that is subject to the tax. Aside from stripper well ("tier 2") production, oil is classified as "tier 1" or "tier 3" oil depending upon whether it is produced from a "property" from which there was commercial production in calendar year 1978. The United States General Accounting Office ("GAO") has stated that "[t]he basic determinant of the windfall profit tax rate is 'property,' a concept which the act incorporates by reference to Department of Energy regulations." [10]

As the GAO recognized, Congress, when it passed the Windfall Profit Tax Act, anticipated that for purposes of the tax, "property" would have "[g]enerally . . . the same meaning as that term is given by the [crude oil] price control regulations." S.Rep. No. 394, 96th Cong., 1st Sess. 52 (1979), *reprinted in* 1980 U.S. Code Cong. & Ad. News 410, 461. Indeed, the Internal Revenue Service ("IRS"), the agency that administers the windfall profit tax program, has promulgated a "property" definition that incorporates the "right to produce" language of the price control definition. 26 C.F.R. § 150.4996-1(i)(1), 47 Fed. Reg. 50858 (November 10, 1982). The IRS has indicated that when it publishes rules relating to the "property" treatment of "separate properties subject to a single right to produce" and to "unitizations," it "will generally follow the rules set forth in FEA Rul. 1977-1, 42 FR 3682 [1977], and FEA Rul. 1977-2, 42 FR 4409 [1977]." 47 Fed. Reg. at 50858.

Thus, it is important not only to current and future cases under the price control regulations, but also to proper administration of and compliance with the windfall profit tax system, that questions concerning the correct meaning and application of "property" be resolved clearly, definitively and coherently.

---

[10] U.S. General Accounting Office, Uncertainties About The Definition And Scope Of The Property Concept May Reduce Windfall Profit Tax Revenues, GAO/GGD 82-48, May 13, 1982, at 1.

2. *The Temporary Emergency Court of Appeals has confused rather than clarified the meaning of "property."* In 1971, when Congress amended the Economic Stabilization Act, it created TECA and gave it exclusive jurisdiction over all appeals in cases and controversies arising under that Act and the regulations issued thereunder. *See* Section 211(b) of the ESA, 12 U.S.C. § 1904 note. It did so "[i]n order to funnel into one court all the appeals . . . and thus gain in consistency of decision," and to "insur[e] prompt and consistent adjudication of all appeals from the district courts. . . ." S. Rep. No. 507, 92d Cong., 1st Sess, *reprinted in* 1971 U.S. Code Cong. & Ad. News 2283, 2292, 2293. However, in dealing with the most fundamental concept of the crude oil pricing system, the "property" definition, TECA has not provided the "consistency of decision" that Congress required of it. Since no other court of appeals has concurrent jurisdiction to interpret that regulation, only this Court can provide the consistency and clarity that TECA's decisions lack.[11]

Three entirely different TECA panels have rendered three major decisions on the meaning of the "property" definition.[12] In the first such decision, *Grigsby* v. *Dep't of Energy*, TECA focused on the actual language of the definition and concluded:

---

[11] Because TECA has exclusive appellate jurisdiction over cases arising under the price control regulations, there will be no conflict among the courts of appeals on this issue. However, as shown *infra*, there is a conflict among decisions of TECA on the meaning of "property."

[12] Unlike other specialized courts such as the Tax Court or the Court of International Trade, TECA is not composed of judges whose primary responsibility is to sit on that court. Rather, TECA is composed of judges of the United States district courts and courts of appeals who are designated by the Chief Justice of the United States from time to time to serve on that court. *See* Section 211(b)(1) of the ESA, 12 U.S.C. § 1904 note.

> The focus of the "property" definition is upon the "right to produce," not the fee or leasehold nature of the ownership interest.

585 F.2d at 1083. The court's conclusion was consistent with the DOE's first interpretation of the definition, announced in Ruling 1975-15, that the "property concept [is] based upon the right to produce crude oil, ..." and that "[f]or purposes of the price regulations then, the property concept is one that identifies the *right to produce crude oil*. . . ." 40 Fed. Reg. at 40832 (emphasis original).

The court then independently analyzed the meaning of "right to produce" as a concept of general applicability. It determined:

> The "right to produce" arises from a combination of sources, including, but not limited to, the nature of the ownership interest, contractual extension or restriction of ownership interest, and *orders of state regulatory agencies.*

585 F.2d at 1083 (emphasis added).

The panel in *Grigsby* was particularly conscious of the role played by the acts of the sovereign states—in that case, as in this, Louisiana—in determining the "right to produce":

> A mineral fee owner has a "right to produce" *subject to state law.* A mineral leasehold owner has a "right to produce" subject to the terms of the lease *and state law.* . . . Although the fee or leasehold interest may be the origin of the "right to produce," such a "right to produce" is controlled, limited, or extended by contractual agreement *and state authorities.*

Id. (emphasis added).

In *Grigsby*, TECA gave careful consideration to the effect on the "right to produce" of an order of the Louisiana Office of Conservation establishing a crude oil production unit. TECA held that the order that established the unit created a "property." *Id.* at 1084-85. That order

was issued by the same body whose orders establish and recognize the units here at issue and control, limit or modify the "right to produce" in Louisiana. In holding the order to have established a "property," TECA relied not on any interpretation or ruling of the DOE, but on its own interpretation of the actual words of the definition itself.

TECA's next considered analysis of the "property" concept came in *Pennzoil Co.* v. *Dep't of Energy*, issued in April 1982. In that case, the panel focused, as had the panel in *Grigsby*, on the actual language of the definition and concluded:

> The statement of the definition that "property means the right which arises from a lease or fee interest to produce crude petroleum" *is obviously quite different in meaning* than if the regulation had provided that "property means a lease or fee interest producing crude oil." As *Grigsby* points out, "[t]he focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." 585 F.2d at 1083.

680 F.2d at 168 (emphasis added). On this basis, the court rejected the argument that, in the context of a production unit formed out of parts of several leases, the leases constituted the "properties." *Id.*

In *Pennzoil*, TECA noted that its decision in *Grigsby* was dictated not by any DOE interpretation, but by "the mandate of the property definition itself." *Id.* at 178. Further, it found that "the controlling concept of Ruling 1975-15 [that the 'right to produce' rather than the ownership interest determines the 'property'] was implicit in the regulatory definition of 'property, '. . . ." *Id* at 170. Accordingly, TECA upheld Ruling 1975-15 on the basis of the language of the "property" definition. *Id.* at 179.

Thus, in *Grigsby* and *Pennzoil*, TECA developed out of the regulatory definition of "property" the clear and "controlling concept" that the "right to produce," which defines the "property," may originate with the lease or

fee interest, but may be further defined by contractual agreement or orders of state regulatory authorities. In so doing, it introduced order and coherence into an area which, under the DOE's administration, had been marked by confusion and uncertainty.

TECA's decision in the instant case, its third major "property" case, marked the return of confusion to this area of the law. Promisingly enough, the court began its opinion by acknowledging its earlier line of decision:

> Although the words "lease" and "fee" appear in the definition, the parties agree, and this court has held, that: "The focus of the 'property' definition is upon the 'right to produce,' not the fee or leasehold nature of the ownership interest." [Citing *Grigsby*].

App. A at 14a. However, rather than looking to its own decisions as precedents or undertaking an independent analysis, TECA chose simply to defer to the DOE's August 1976 "finding" that

> "the literal meaning of the term 'property' . . . is generally to be understood as synonymous with the physical 'tract' or 'premises' as to which a working interest is established by an oil and gas lease, or by a fee interest" . . . "[T]here should have been no doubt but that CLC intended by its definition of property to signify the premises described by an oil and gas lease" as the property in the vast majority of instances.[18]

Id. at 15a (citations omitted). Following the DOE's lead rather than its own, the court refused to recognize as being within the "property" definition any "rights to pro-

---

[18] The DOE's statement that "there should have been no doubt" as to the meaning of "property" is incomprehensible in light of both the admission of the FEA's Deputy Administrator that the meaning was unclear to the agency itself and the DOE's own conclusion in April 1976 that LOC units could be "properties" under the original definition.

duce" other than leases, fee interests and those expressly approved in Ruling 1975-15. *Id.* at 17a, 18a.

The court made no effort to reconcile its decision with its analysis in *Grigsby* that other sources of the "right to produce," such as "orders of state regulatory agencies," determine "properties." *See Grigsby*, 585 F.2d at 1083. Nor did the court even attempt to explain how the "right to produce" concept entailed that the Louisiana production units at issue in *Grigsby* were "properties" while those at issue here were not. Indeed, the court completely ignored the essential fact that in *Grigsby*, it found the "right to produce" in the LOC order that established the unit there at issue. Instead, the court gave absolutely no weight to the fact that the producing entities that petitioners sought to have declared "properties" in this case are products of the same State regulatory system and are established and recognized by the same State agency as the unit involved in *Grigsby*. Viewed from the perspective of the "right to produce," the units are indistinguishable.

By holding in *Grigsby* and *Pennzoil* that the "right to produce" is "obviously quite different in meaning than" the lease or fee interest, while, in the instant case, upholding the DOE's "general position that the lease defines the property," TECA has once again created tremendous confusion as to the meaning of "property." It is a given that the "right to produce" defines the "property." Yet TECA has no coherent concept of that right. In particular, various panels of that court have held that "orders of state regulatory authorities" do—and do not—define the "right to produce." These contradictory holdings represent a signal failure by that court to fulfill its mandate to provide "consistency of decision." Moreover, by refusing to rehear this case *en banc*, TECA has demonstrated that it will not reconcile its divergent decisions. *See* App. C. Because TECA is unwilling—or unable—to provide a clear and coherent understanding of the fundamental concept of "property," this Court should.

3. *The Temporary Emergency Court of Appeals' uncritical acceptance of the DOE's general "lease defines the property" interpretation has denied petitioners their right to meaningful judicial review.* TECA deferred, without analysis, to the DOE's "general position that the lease defines the property" on the sole ground that it found that position to be "reasonable." *See* App. A at 14a. In so doing, that court ignored the language of the definition whose interpretation was at issue. It ignored the prior inconsistent agency interpretations of that definition. It ignored the district court's findings that the DOE itself was confused as to the meaning of "property" and that the definition itself gave producers "no clue whatsoever" that reservoir-wide LOC units could not be treated as "properties." *See* App. E at 49a, 50a. It ignored the district court's finding that the treatment of reservoir-wide LOC units as "properties" was consistent with the objectives of the price control program. *See id.* at 48a. And it assigned no importance to the fact that the units involved in this case are established and recognized by the official act of a sovereign state, petitioner Louisiana.

The approach of the court below to judicial deference to agency interpretations offends even the accommodating standards of this Court's decision in *Skidmore.* In *Skidmore,* this Court, unlike TECA, recognized that deference to agency interpretations is not an absolute rule. 323 U.S. at 140. *Accord, Chrysler Corp.* v. *Brown,* 441 U.S. 281, 315 (1979). Rather, this Court held that the deference to be accorded an agency's interpretation depends on an analysis of "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore,* 323 U.S. at 140. *Accord, General Electric Co.* v. *Gilbert,* 429 U.S. 125, 141-42 (1976). TECA has subverted this standard by substituting deference for analysis, requiring nothing of the agency other than its *ipse dixit.* It has ignored this Court's admonition that "[t]he deference owed to an [administrative

agency] . . . cannot be allowed to slip into judicial inertia. . . ." *Volkswagenwerk* v. *Fed. Maritime Comm'n*, 390 U.S. 261, 272 (1968), *quoting American Ship Building Co.* v. *NLRB*, 380 U.S. 300, 318 (1965).

The considerable amount of time that passed before the DOE adopted the "property" interpretation at issue makes TECA's deference to that interpretation particularly inappropriate in this case. Deference is to be "based on such factors as the timing and consistency of the agency's position, ..." *Chrysler Corp.*, 441 U.S. at 315; *Batterton* v. *Francis*, 432 U.S. 416, 425 n.9 (1977). Here, TECA had before it an interpretation issued fully three years after the definition was announced and had to be applied; one year after the DOE first announced that the focus of the definition is on the "right to produce"; and only four months after the DOE indicated that it had not yet made up its mind as to the meaning of "property" and concluded that the very types of units at issue here were probably "properties." As the district court found:

> The DOE, itself, admitted in its hearings before a Congressional subcommittee that the property definition was ambiguous and unclear and that the meaning had not been clear to the agency. . . . Further, the DOE did not decide upon or publicly announce its interpretation of the property definition until the end of the relevant period; *i.e.*, until August, 1976.

App. E at 49a. Nonetheless, TECA found the interpretation to be "reasonable," and commented that there was no justification for petitioners to have thought otherwise. App. A at 14a, 20a. In short, TECA has held petitioners to a higher standard of knowledge than it has the agency.

This perverse result is made even worse by the fact that between the time of the DOE's interpretation and the time of the decision below, TECA decided *Grigsby* and *Pennzoil*. As shown, the holding of those cases with respect to the "right to produce" cannot be reconciled with the "lease defines the property" interpretation that the

DOE announced in August 1976 and that the court upheld in this case. It affronts the doctrine of judicial review for a reviewing court to give unquestioning deference to an agency interpretation that conflicts not only with the agency's own prior pronouncements, but with the prior interpretations of that court itself. Such a blatant failure to review, particularly in a case involving an issue of great importance and claims of nearly one billion dollars, should be corrected.

Congress has condemned the practice of uncritical deference by the courts it has charged with the responsibility to review agency action. The United States Senate has passed, and the House Judiciary Committee has favorably reported out, regulatory reform legislation amending, *inter alia*, the judicial review provision of the Administrative Procedure Act, 5 U.S.C. § 706(c).[14] The Senate version provides, in relevant part:

> In making determinations on other [*i.e.*, nonjurisdictional] questions of law, the court shall not accord any presumption in favor of or against agency action, but in reaching its independent judgment concerning an agency's interpretation of a statutory provision, the court shall give the agency interpretation such weight as it warrants, taking into account the discretionary authority provided to the agency by law.

S. 1080, 97th Cong., 2d Sess. § 5(b) (1982). This provision is intended to reinstate the primacy of the standards for review established by this Court in *Skidmore*. In its report on this bill, the Senate Judiciary Committee deplored "certain instances" in which the doctrine of deference "is applied as a virtual presumption of correctness

---

[14] S.1080, 97th Cong., 2d Sess., 128 Cong. Rec. S2713-21 (daily ed., March 24, 1982); H.R. 746, 97th Cong., 1st Sess., 127 Cong. Rec. H73 (daily ed., January 6, 1981); H.R. Rep. No. 435, 97th Cong., 2d Sess. (1982) (report of House Comm. on Judiciary).

of all interpretations of law by an agency." Rather, it stated,

> in examining an agency interpretation of law, the court should evaluate "the thoroughness exhibited [sic] in [the agency's] consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Skidmore* v. *Swift & Co.* 323 U.S. 134, 140 (1944). The court should also weigh any countervailing factors bearing on the validity of the agency's legal position.
>
> Accordingly, under this amendment, a reviewing court may not proceed on the assumption that it should uphold an agency's statutory construction merely because that construction is not unreasonable or not irrational.

S. Rep. No. 284, 97th Cong., 1st Sess. 165, 170, 171 (1981).

This Court should not tolerate such an abdication of the duty to review as manifested by TECA in this case. As TECA itself has acknowledged, "the final power of interpretation is in the courts." *Energy Reserves Group, Inc.* v. *Dep't of Energy*, 589 F.2d 1082, 1093 (Temp. Emer. Ct. App. 1978), *quoting* Davis, *Administrative Law Of The Seventies* § 5.03-1 at 152 (1976). As the only Court supervising TECA's review of important economic legislation and regulation, this Court should require at least a reasoned and coherent analysis. Such supervision is particularly appropriate in this case, which presents the opportunity to clarify the meaning of the most fundamental principle of those regulations, "property."

CONCLUSION

For the foregoing reasons, petitioners respectfully request that the writ of certiorari be allowed.

Respectfully submitted,

/s/ Allan Abbot Tuttle

ALLAN ABBOT TUTTLE
Counsel of Record

JAMES R. PATTON, JR.
GEORGE M. BORABABY
PATTON, BOGGS & BLOW
2550 M Street, N.W.
Washington, D.C. 20037
(202) 457-6000
Attorneys for Petitioner State of Louisiana

ANDREW J. KIRKPATRICK, JR.
WILLIAM O. LAMOTTE, III
RICHARD D. ALLEN
MORRIS, NICHOLS, ARSHT & TUNNELL
Twelfth & Market Streets
P.O. Box 1347
Wilmington, Delaware 19899
(302) 658-9200
Attorneys for Petitioner Texaco Inc.

JOHN R. COPE
THOMAS D. MANFORD, III
DARCI L. ROCK
BRACEWELL & PATTERSON
1825 I Street, N.W.
Washington, D.C. 20006
(202) 828-5800
Attorneys for Petitioner The Louisiana Land And Exploration Company

THE HONORABLE DAVID C. TREEN
Governor, State of Louisiana

THE HONORABLE WILLIAM J. GUSTE, JR.
Attorney General, State of Louisiana

THE HONORABLE FRANK P. SIMONEAUX
Secretary, Department of Natural
Resources, State of Louisiana

THE HONORABLE PATRICK H. MARTIN
Commissioner of Conservation,
State of Louisiana

HARRY E. BARSH, JR.
DAVID R. FROHN
CAMP, CARMOUCHE, PALMER, BARSH
& HUNTER
A Professional Law Corporation
P. O. Drawer 2001
Lake Charles, Louisiana 70602
(318) 433-9355
Of Counsel for Petitioner
State of Louisiana

STEPHEN H. BARD
Texaco Inc.
2000 Westchester Avenue
White Plains, New York 10650
(914) 253-4000

PATRICK T. CAFFERY
CAFFERY, OUBRE, GIBBENS & BLACKWELL
420 Iberia Street
New Iberia, Louisiana 70560
(318) 364-1816
Of Counsel for Petitioner
Texaco Inc.

J. HENRY PHILLIPS, III
CHARLES D. MARSHALL, JR.
MILLING, BENSON, WOODWARD, HILLYER,
PIERSON & MILLER
Eleventh Floor
Whitney Building
New Orleans, Louisiana 70130
(504) 581-3333
Of Counsel for Petitioner The
Louisiana Land And Exploration
Company

December 23, 1982